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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 158

BUDGET DRESS CORP.,

Petitioner,

against

JOINT BOARD OF DRESS AND WAISTMAKERS' UNION OF GREATER NEW YORK and its Constituent Locals, and CHARLES S. ZIMMERMAN, NATHANIEL M. MINKOFF and LEON NAMENWIRTH, individually and as General Manager, Secretary-Treasurer and President respectively, of the JOINT BOARD OF DRESS AND WAISTMAKERS' UNION OF GREATER NEW YORK; THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION AFL-CIO; and THE POPULAR PRICED DRESS MANUFACTURERS' GROUP, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

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TABLE OF CONTENTS.

	PAGE
I.—Opinions Below	1
II.—Jurisdiction	2
III.—The Questions Presented for Review	2
IV.—The Statute and Rule Involved	3
V.—The Proceedings Below	4
VI.—Statement of the Case	7
VII.—Reasons for Granting the Writ	8
VIII	29
Appendix A	1a

Table of Cases.

	PAGE
Caminetti v. *U. S.* (242 U. S. 470, 37 S. Ct. 192, 61 L. Ed. 442)	11
Colby v. *Kline* (178 F. 2d 872)	28
Greenstein v. *National Skirt & Sportswear Association* case, 178 F. Supp. 681, 274 F. 2d 430 (CA 2)	17
Hamilton v. *Rathbone*, 175 U. S. 414, 20 S. Ct. 155, 44 L. Ed. 219	11
Hummel v. *Riorden* (N. D. Ill., 56 F. Supp. 983)	23
In Re Larry Jay, Inc. (3 App. Div. 2d 386, 160 N. Y. Supp. 2nd 790)	15, 16
Klein v. *Cross*, App. Dept., Superior Court, Los Angeles, Civ. A. No. 9383, Dec. 19, 1947, 41 LRRM 2325	15
Kriendler v. *Clarisse Sportswear Co.*, 184 F. Supp. 182	18
Minkoff v. *Scranton Frocks*, 181 F. Supp. 542, 279 F. 2d 115 (CA 2)	17
NLRB v. *Local 138 Operating Engineers*, 293 F. 2d 187	18
Pillsbury v. *United Engineering Co.*, 342 U. S. 197, 72 S. Ct. 223, 96 L. Ed. 146	15, 16
Sartor v. *Arkansas Natural Gas Corp.*, 321 U. S. 620	28
Sturges v. *Crowninshield* (4 Wheat 122, 202, 4 L. Ed. 529, 550)	11
Whitaker v. *Coleman* (CCA 5th, 115 F. 2d 305)	25, 26

Statutes.

	PAGE
Labor Management Relations Act,	
Section 8(e)	16
Section 186	3, 8
Section 301	5
Section 302	2, 4, 5, 9, 10, 12, 13, 14, 15, 16, 18, 19, 20, 22
Federal Rules of Civil Procedure,	
56(f)	4, 23, 24, 25

Other Authorities.

Senate Report No. 105 on S. 1126	12
Congressional Record, Senate, April 25, 1947, 4157	12
Cong. Record, Senate, May 7, 1947, 4805	13, 21
Cong. Record, Senate, May 13, 1947, A2378	13, 21
Moore's Federal Practice, Vol. 6, p. 2345	25
Moore's Federal Practice, Vol. 6, Par. 56.15 (3), page 2123	27

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER, BUDGET DRESS CORP., PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MARCH 9, 1962.

I.

Opinions Below.

The opinion of the United States District Court for the Southern District of New York is reported at 198 F.

Supp. 4 (R54a-64a).* The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported at 299 F. 2d 936. (Appendix A, *infra* pp. 1a-2a).

II.

Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed is dated and was entered on March 9, 1962 (R218b-219b). The jurisdiction of this Court to review this case on certiorari is invoked under 28 U. S. Code, Section 1254 (1).

III.

The Questions Presented for Review.

Whether under Section 302 of the Labor Management Relations Act, as amended, (29 U. S. Code 141 et seq.), hereinafter called the Act, which prohibits a union from demanding or receiving any money from an employer, a union may lawfully demand and receive money from an employer allegedly but not concededly for a trust fund, the benefits of which the union admits do not inure to the employees based upon whose toil and wages the payments are demanded and received. This issue is one of first impression before this court.

Whether a union may lawfully demand and receive money from an employer based upon the toil and wages of the employees of such employer, under circumstances wherein the union consented that the employer work with

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* Numbers preceded by "R" refer to pages in record certified to the Clerk of the United States Supreme Court by the Clerk of the United States Circuit Court for the Second Circuit.

shops not under collective agreement with the union and whose employees are not members of the union, and allegedly turn these monies over to health and welfare funds of the union, in spite of the fact that the union knew that none of the employees of such employer at any time could benefit from such funds. This issue likewise is one of first impression before this court.

Whether under the circumstances of this case the granting of Summary Judgment prior to Petitioner's taking Respondent's depositions in support of the Complaint was premature and in violation of the due process of law to which Plaintiff was entitled.

IV.

The Statute and Rule Involved.

The statute involved is 29 U. S. Code, Section 141 et seq., 61 Stat. 136, known as the Labor Management Relations Act of 1947, and in particular Section 186, which provides, in pertinent part:

> "Sec. 186 (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer or such employees any money or other thing of value.
>
> (c) The provisions of this section shall not be applicable * * * (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive bene-

fit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents).".

The statue involved was amended by the Labor Management Reporting and Disclosure Act of 1959 in respects not here germane. The above cited Section will be cited by its popular designation, Section 302.

The rule involved is Rule 56 (f) of the Federal Rules of Civil Procedure and reads as follows:

> "(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

V.

The Proceedings Below.

This case originated with the filing and service of a summons and complaint upon the Defendants (the designations of the parties in the District Court will be used throughout) on August 6, 1959. The Plaintiff is also at times referred to as the "Employer" and the Defendants either "Union" or "Association", as the case may be. The complaint seeks to recover monies wrongfully demanded and collected from Plaintiff by Defendants in violation of Section 302.

The Union acknowledged below that none of the employees upon whose toil and wages the payments demanded and

received were based could derive benefits from any health and welfare funds administered by the Union.

The complaint alleges two causes of action. The first cause alleges that Plaintiff is a manufacturer of dresses and was under collective agreement with the Defendant Union by reason of its membership in the Defendant Association; that Plaintiff resigned from the Defendant Association as of December 31, 1957 and was under no further obligation to the Defendant Union after expiration of the then existing collective agreement on January 31, 1958; that Defendants made demands upon and received monies from Plaintiff based upon earnings of workers; that no part of these monies were received by said workers, nor did any of said workers or their families or dependents derive any benefits from said monies, either directly or indirectly; that said workers were specifically excluded and ineligible to receive any benefits from any health, welfare and/or retirement funds and that said workers and their families could not derive any benefits from said monies; that, accordingly, the demand, receipt and acceptance of any such monies; were in violation of Section 302 of the Labor Management Relations Act; and that all such monies should be repaid to Plaintiff (R2a).

The second cause of action seeks injunctive relief based upon the unlawful demands of the Defendant Union (R2a).

Jurisdiction and the causes of action are predicated upon Sections 301 and 302 of the Labor Management Relations Act, 29 U. S. C. 185, 186.

The summons and complaint were served upon the Defendants on August 6, 1959. On August 26, 1959, exactly 20 days after service of the complaint, an answer accompanied by notice of depositions before trial and subpoenas with reference thereto, were simultaneously served upon Plaintiff. The manner in which the notice for depositions

and subpoenas were served together with the answer prevented Plaintiff from first serving notices for depositions. As a result, Plaintiff moved before the United States District Court for the Southern District of New York for leave to first examine the Defendants before trial, which motion was heard by Chief Judge Ryan, who ruled that prior service of the notices for depositions entitled Defendants to examine Plaintiff first. (Reported at 178 F. Supp. 699.)

After the examinations of Plaintiff by the Defendant Joint Board, was concluded and during the course of depositions before trial by the other Defendants, Defendant, Joint Board, moved by way of order to show cause in the same said District Court, to dismiss the complaint. The said order to show cause stayed Plaintiff from its attempted depositions of the Defendants until determination of the motion.

Plaintiff has throughout this litigation moved with diligence and was ready to take the depositions of Defendant immediately upon receiving the Defendant's answer below and would have so acted except for Defendant's filing its notice for depositions with its answer. Defendant's motion for summary judgment and to stay Plaintiff's taking the depositions was made to prevent Plaintiff from ascertaining facts which would aid Plaintiff in establishing its causes of action at trial.

The motion for summary judgment made by Defendant Joint Board was granted and was affirmed upon appeal to the United States Circuit Court for the Second Circuit. It is from this judgment that Plaintiff seeks the issuance of a writ of certiorari to the United States Court of Appeals For The Second Circuit.

VI.

Statement of the Case.

The Parties and their Relationship

Plaintiff is a manufacturer and designer of ladies' dresses which it sells to the retail trade. The cutting, sewing and trimming of garments is done by "contractors" with which Plaintiff deals from time to time.

Defendant Joint Board of Dress and Waistmakers' Union of Greater New York, is a Union composed of locals of Defendant International Ladies Garment Workers' Union, a national labor organization. The two above mentioned Unions will hereafter be referred to collectively as the "Union".

For more than 20 years and up to January 31, 1958, Plaintiff was a member of the Popular Priced Dress Manufacturers' Group, Inc., (hereinafter called "Association"), and as such was covered by the contracts between the Association and the Defendant Unions.

Each month during the term of the agreement Plaintiff, at the demand of the Defendant Union and upon the Defendant Union's forms, forwarded to the Defendant Union a list of contractors with which Budget had done work the previous month, showing the amount of work done in each contracting shop together with a check representing a percentage of the wages earned by the employees that previous month. Various monthly statements, copies of which are in the record (R43a, 53a) contained the names of both Union and non-union contractors with which Plaintiff had been working. Plaintiff had obtained consent from the Union to work with non-union contractors so

long as it paid the monies demanded by the Union with respect to the non-union contractors.

Defendant Unions agreed to Plaintiff's utilizing non-union contractors so long as Plaintiff capitulated to the demand for contributions based upon the wages of the employees in the non-union shops, in spite of the fact that the Union knew that the employees were not members of Defendant Union and who could and would not under the funds' rules and regulations share in the benefits resulting from the payments demanded and received from the Employer.

Certain basic facts in this action are admitted by Defendants and these admissions are summed up in the opinion of Judge Ryan below:

> "Although it appears that some or all of these monies in suit were paid into the funds computed on payments for work performed for Plaintiff by a Union contractor, Defendants in order to obviate any possible question of fact have stipulated that this Court may assume (for purposes of this motion only) that the sums paid were based upon payments made by Plaintiff to non-union contractors and not 'covered workers' and not employed by 'covered employers', and that consequently, they are not eligible to receive benefits from these funds." (R60a)

VII.

Reasons for Granting the Writ.

1.

This case presents an important question of first impression relating to the language of Section 186 of the Act, set forth above at p. 3, and to its intended scope, which question should be settled by this Court.

Section 302 makes it unlawful for a Union to demand, receive or accept any money or other thing of value, except under certain specific and enumerated circumstances. The Defendant Union concedes that it and its representatives did demand, receive and accept money from Plaintiff. The demanding and receipt of this money from Plaintiff was unlawful unless it satisfies the exceptions to the broad prohibitions of Section 302 of the Act. The only pertinent exception here is Section 302(c)(5).

Section 302(c)(5) excepts payments by an employer to a trust fund from the broad prohibitions of Section 302 only under certain specified circumstances:

> "... with respect to money or other things of value to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents ...)".

The Defendant Union concedes the demands for the monies and concedes,

> "... that the sums paid were based upon payments to non-union contractors, that the workers in the shops of these contractors are not 'covered workers' and not employed by 'covered employers', and that consequently they are not eligible to receive benefits from these Funds."

The Union demanded the subject monies knowing that the employees would not and could not benefit from the funds and without any intention that they should benefit. These monies were not (using the statutory language)

"paid to a trust fund . . . for the sole and exclusive benefit of the employees of such employer . . ."

The issue in this case, i.e., whether under Section 302 a Union may lawfully demand and receive money from an employer the benefits of which do not inure to the employees, or any of them, based upon whose toil and wages the payments are demanded and received, is of great significance considering the power of unions, and specifically of the ILGWU and the Joint Board, to coerce such payments and considering also the latitude and privileges which unions in the apparel industry are given under the Act and other laws.

The demand and receipt of these monies is unlawful under the circumstances of this case. The unlawful act is not rendered lawful by the Unions' present contention that the money (part or all) is turned over to funds (of which the employees of the paying employer are not beneficiaries) rather than made other use of.

The statute in question was artfully drawn to insure that the employees derive benefits from the funds into which employers are required to make payments and to limit the type of payments which a Union can demand and which an employer may make. The payments demanded of plaintiff in this case do not fulfill the requirements of the statute and were unlawfully demanded and received.

The statutory language quoted above is an exception to a broad provision outlawing all payments to union representatives and as such is to be strictly construed.

The exception is specific; its language and intent clear and unmistakable; and it should be read without the deletion or addition of any words. It is a maxim of statutory interpretation that when the language of a statute or a part thereof is clear and unmistakable, no construction is needed

or allowed. (*Hamilton* v. *Rathbone*, 175 U. S. 414, 421, 20 S. Ct. 155, 44 L. Ed. 219). In *Caminetti* v. *U. S.* (242 U. S. 470, 37 S. Ct. 192, 61 L. Ed. 442), this Court stated:

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms."

Chief Justice Marshall wrote to the same effect:

> "Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application." *Sturges* v. *Crowninshield* (4 Wheat 122, 202, 4 L. Ed. 529, 550).

The practice here complained of is not isolated to this Plaintiff and the Unions. In fact this is a frequent practice by these Unions in the garment industry. The law should be defined and the illegal practice stopped.

In the instant case, the statute in question clearly exempts only payments made by employers to funds whose benefits are to be for the employees of "such employer". This is as it should be. The demand for monies with respect to

employees who are excluded is in violation of the Act. The Union conceded that the employees for whom payments were made were and are precluded from the benefits under any funds. The Union by demanding and receiving monies, knowing that the employees for whom payments are made are excluded, violated the Act.

Although the plain meaning is clear and unmistakable and construction is therefore not warranted, the plain meaning of Section 302 (c) (5) of the Act is amply supported by the reports and statements made during the Congressional debates which culminated in the passage of the 1947 Amendment of the Act.

The majority report on the Senate Bill which substituted the language of 302 (c) for proposed language which would have outlawed all trust funds states:

> "Without such restraints, employees would have no more rights in the funds supposedly established for their benefit than their union leaders choose to allow them." (Senate Report No. 105 on S. 1126).

The minority report concurred as follows:

> "In considering S. 1126, the committee properly eliminated sections prohibiting any payment by any employer to any representative of his employees . . ., except under narrowly restricted circumstances. One of the prineipal exceptions was permissible payment to a trust fund soleiy for the benefit of the employer's own employees . . ." (Senate Minority Report No. 105 on S. 1126; see also Congressional Record, Senate, April 25, 1947, 4157).

Senator Ball, in support of the language of Section 302 (c) (5) made clear that the exception to the prohibition meant just what it said, as follows:

> "Mr. President, the sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them . . ." (Cong. Record, Senate, May 7, 1947, 4805);

and further:

> "Again, all we are doing is protecting the rights of the employees whose toil creates these welfare funds.", (Cong. Record, Senate, May 13, 1947, A2378).

The language, intent and purpose of Congress in enacting Section 302 (c) (5) is clear. The language, intent and purpose was to limit the demand and collection of monies to funds established for the sole and exclusive benefit of the employees of such paying employers.

This is a matter of first impression at this level. The Court should be guided by the intent of Congress manifest by the language used and the statements made in support thereof and should find the demands and receipts admitted by the Defendants to be in violation of the Act.

The Defendant Union conceded that the employees for whom Plaintiff had to pay a proportion of their wages to the Union could not benefit from the payments in question. The Union has conceded that (60a):

> (1) The employees were not covered workers;
>
> (2) That employees were not employed by covered employers; and
>
> (3) The employees for whom the payments were made were not eligible to receive benefits from the funds.

Thus, even with respect to the money allegedly paid to the trust funds, the funds were not "for the sole and exclusive benefit of the employees of such employer and their families and dependents" and do not qualify under Section (302) (c) (5).

In phrasing the exception the Congress could have excluded "such employers" and could have had the section read "for the sole and exclusive benefit of employees, and their families . . ."—but the Congress did not delete these words. Congress intended what they said in clear and unmistakable language.

The statute expressly deals with monies for the benefit of the employees of the paying employer, not employees generally, and this is so even with regard to "pooled" funds by saying "or of such employees . . . together with the employees of other employers making similar payments."

The opinion of the District Court that "so long as the funds are used for the benefit of the employees (in the dress industry) and not diverted to other uses, the statutory immunity applies to these payments . . ." (R67a) is in error and in complete disregard of the language of the statute. The rules and regulations of the funds specifically exclude employees, such as those of the Plaintiff from the benefits of the funds, and the Union knew this at the time it demanded and received such monies. The payments must be for funds which meet the requirements of Section 302 (c) (5) and this does not mean for employees generally.

It is beside the issue to contend that the funds are pooled funds to which payments are not made for the benefit of any particular worker. The funds into which money is paid, pooled or otherwise, must still be for the "sole and exclusive benefit of the employees of such employer . . . (or of such employees . . . jointly with the

employees of other employers making similar payments ...);..."

The Courts are not free, under the guise of construction, to amend a statute by inserting or striking words from a statute or in any way rewriting it (*Pillsbury* v. *United Engineering Co.*, 342 U. S. 197, 72 S. Ct. 223, 96 L. Ed. 148). This is what the District Court did by failing to give meaning to the words "employees of such employer" in Section 302 (c) (5) of the Act. There is no basis in the Act for the exclusion of a group of employees from the protection of the Act, as was done here, whereas there is a specific requirement that they reap benefits from the funds, or else the demand and receipt of payments are illegal.

There are cases in which it has been held that payments must be made into welfare funds on the basis of the wages of non-union as well as unionized employees (*Klein* v. *Cross*, App. Dept., Superior Court, Los Angeles, Civ. A. No. 9383, Dec. 19, 1947, 41 LRRM 2325). The union, however, in that case and in the others in point, was the bargaining agent for the employees, whether union members or not, and both union and non-union employees were beneficiaries of the Funds. In the instant case the Union was not the bargaining agent for the employees of the non-union contractors, it never has claimed to be, and it cannot be until and unless it has shown majority status. The latter element is the cardinal element of our National Labor policy. Also, in the case at bar, the non-union employees concededly are not eligible for benefits under the plan.

The case of *In Re Larry Jay, Inc.* (3 App. Div. 2d 386, 160 N. Y. Supp. 2nd 790), holds that employees of a contractor given work by a jobber who is subject to the terms of a collective bargaining agreement are, for the purposes of the protection of the employees covered by the agree-

ment, i.e., employees of the jobber. Thus, in *Larry Jay*, the wages of the non-union contractor(s) are protected, whereas in the instant case the Union's position, in substance, is to cast to the winds the rights and interests of such employees. This, it would do, cynically, it might be added, in view of long time, arduous and successful efforts by the Union to have the jobbers and the contractors in the garment industry considered as inseparably allied and as the same employers. As a matter of legislative intent, convincing evidence exists that Congress, prior to the 1959 Taft-Hartley amendments, intended that the law apply this way in the garment industry. The exception is now set forth in Section 8 (e) of the Act makes the intention explicit and definite.

The Union, having been charged with a patent violation of Section 302 (c) (5) of the Act, ingenuously and capriciously came up with the excuse of the measuring rod concept which is belied in the very Rules and Regulations dictated by the Union itself.

Thus, we return to the basic limitation of Section 302 (c) (5):

> "for the sole and exclusive benefit of the employees of such employer."

Even if the germane provisions of the contract and the rules of the funds sought to penalize jobbers for letting out work to non-union contractors, the statute as written prohibits the type of payments made herein and Congress alone can change the wording of the statute (*Pillsbury* v. *United Engineering Co., supra*).

If, as the Court below found, the funds were generally for employees in the dress industry, why were these subject employees, who obviously are in the dress industry and for whom payments obviously were made, excluded as beneficiaries?

Reductio ad absurdum if the employees of the non-ILGWU shops chose another union which provided health, welfare and pension benefits upon payment by the jobber or contractor, the Court below would still require payments under the Funds to the Union thereby requiring the employer to pay twice. This would be true even if, as here, the Union condoned the use of non-designated shops.

This is a case of first impression before this honorable Court. The few decisions of lower courts cited below are distinguishable upon their facts and under any circumstances did not apply the statute as intended and as written.

Greenstein v. *National Skirt & Sportswear Association* case, 178 F. Supp, 681, 274 F. 2d 430 (CA 2), cited by Judge Ryan, is not pertinent to the issues in this matter. The facts therein are significantly different. It must be noted that in Greenstein the monies claimed by the union were liquidated damages and not monies due to be paid to the funds based upon the weekly wages of employees who were not eligible for benefits. In the case at bar the use of non-union contractors was with the knowledge and consent of the union, and no taint is possible by reason of this acquiescence. No concession was made by the union in the Greenstein case, such as here, that none of the employees of the employer were beneficiaries.

Minkoff v. *Scranton Frocks*, 181 F. Supp. 542, 279 F. 2d 115 (CA 2), likewise is not in point. The union there contended that the workers who were expelled from union membership in that case, were nevertheless covered employees and the employer a covered employer and that therefore the employees were eligible for benefits. There is a very significant distinction wherein individual employees of a covered employer are denied benefits, although the union contends that the employer's employees generally were so entitled, compared with the instant case wherein the union

concedes that neither the employer nor the employees are covered, hence, the very demand and payments were unlawful. In the *Scranton* case the denial of benefits was a matter to be settled between the worker and the fund. Where, as here, the very demands were for monies which were not for the sole and exclusive benefit of the employees of the paying employer, which the union concedes, there is a violation of the statute and there is a basis for Plaintiff's recovery of the monies unlawfully collected.

It is submitted that *Kriendler* v. *Clarisse Sportswear Co.*, 184 F. Supp. 182, is in error. The Court therein countenanced "members only" funds, contrary to National Labor Relations Board and court cases (see *NLRB* v. *Local 138 Operating Engineers*, 293 F. 2d 187) and would rewrite the statute to allow exceptions to the broad provisions prohibiting payments where no such exceptions were provided by the Congress. The Court in *Kriendler* also errs in its reasoning that if the employer's contention therein is correct, i.e., that the funds to which payments were made were not for the sole and exclusive benefit of his employees and hence for the payments to be lawful all should be covered, then an employer whose employees are engaged in two crafts and who were members of two different unions could not lawfully contribute to the funds of either because neither fund would be for the benefit of all employees. The test in such a case would be whether the employees for whom monies were paid into the particular fund could benefit from that fund.

The Act is not concerned with the technical aspects of determining and administering the payment benefits under the plans as defined by Section 302. In the instant matter the Court below failed to see that it is not the technical matter of administering the payments made by the funds that is in issue, but rather the requirement of the Union

that it not demand monies from employers for funds or otherwise, which under no stretch of the imagination could be for the sole and exclusive benefit of the employees of such employer. Failing to be for "the sole and exclusive benefit of the employees of such employer . . . (or of such employees, . . . jointly with the employees of other employers making similar payments, . . .)", the demand for such payments and their collection is a violation of Section 302.

The union argued below that the employees in the manufacturing shops are not employees of Plaintiff. If they are not Plaintiff's employees, what basis have the unions for demanding payment from Plaintiff based upon their wages and toils?

Plaintiff does not contend that those employees of Budget, or of a contractor of Budget, who had nothing to do with the production of the dresses involved and on whose behalf no payments were made, are entitled to benefits under the Funds. Thus, an office clerical would not ipso facto be entitled to benefits under the Funds. Plaintiff does contend, and it is supported by legislative history of the statute and by the words of the statute itself, which are the primary sources for statutory construction, that employees for whom payments are made and on whose toil the payments are figured and paid are entitled to benefits from the Funds. If they are excluded, as they are in the instant situation, the payments received by the Union based upon their efforts and paid on their behalf, but from which they cannot benefit, are illegally demanded and received. Likewise, if some of Budget's employees were covered by a different union and no payments were made to the instant Funds on their behalf, there would be no claim, nor could there be if these employees should be beneficiaries of the Funds.

All employees in a class, group or classification are entitled to the same benefits. In view of the peculiar relationship between jobbers and contractors, the employees of the contractors stand in the relationship of employees of Plaintiff as was contemplated by Section 302(c)(5). Since the monies demanded and received were based upon the earnings of those employees, they were entitled to benefits.

For Appellees to contend, as they do, that it can select beneficiaries from within the classes of employees for whom payments were made, is for them to distort the entire purpose of Congress. It was, *inter alia*, the power to choose and the corollary power to omit certain employees from benefits, that Congress was concerned with, when it passed the subject legislation. The obvious intent, as manifest by the statements made in support of the provisions of Section 302(c)(5), was that all employees benefit from these payments and not just as the Union saw fit.

The Union's blatant disregard for employees is clearly shown by the language it used on Page 22 of its brief below:

> "It (the statute) does not require that they (benefits) be paid to all classes. Here, it is plain that the categories of the beneficiaries selected were within the permissible classes".

The complaint states a good cause of action to recover monies unlawfully demanded, received and accepted by the Union and its representatives in violation of the Act.

The District Court labelled Section 302(a)(b)(c) as an anti-bribery statute at the very outset of its opinion (54a) and added a footnote to the effect that Congress was concerned primarily with the corruption involved in collective bargaining. The Court also emphasized that because, in the Court's opinion, none of the officials of the Union pocketed

any of the monies demanded and received there could be no violation of the statute. This label and this interpretation of the Act is wrong. The statute was enacted by Congress with the expressed view to protect the employees upon whose toil the payments were made. Congress enacted this statute to prevent any unlawful conduct on the part of the defendant union or its representatives, irrespective of whether the monies demanded and received were put into the pockets of Union officials, funds or elsewhere. Congress qualified the type of funds which would suffice.

The Act was never intended solely as an anti-bribery statute. As Senator Ball stated in support of this Section.

> "Mr. President, the sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them . . ." (Cong. Record, Senate, May 7, 1947, 4805).

and further:

> "Again all we are doing is protecting the rights of the employees whose toil creates these welfare funds" (Cong. Record, Senate, May 13, 1947, A2378).

If the interpretation of Judge Ryan were accepted, then any person demanding money, no matter how unlawful and illegal could circumvent the statute by delivery of the money to a fund in no way related to the employer or the employees in question.

The true disposition made of the money demanded and received by the Union remains to be established during the course of depositions of the Defendants and upon trial. The Defendants have made every effort to prevent these

depositions. Obviously, the defendants are withholding this information from the Plaintiff and the courts.

The anti-bribery label imposed by Judge Ryan upon this Section, was never intended by Congress. It in fact adds language to a statute which Congress was careful to avoid, namely, a limitation of the unlawful acts involved in the improper demanding of monies. The Record on this appeal established that the defendants knowingly demanded and received monies from an employer based upon the toil of employees who would derive no benefits from such monies. The record on this appeal establishes that the Union knew that the purpose of these payments was labor peace, i.e., no strikes, picketing, work stoppages and the free flow of goods (48a). These are the very acts which Congress sought to outlaw by prohibiting payments to defendants or to Union representatives.

The statute is far broader than a mere anti-bribery statute. There are other federal penal laws which make bribery unlawful and it was not necessary for Congress to enact Section 302 to outlaw bribery as such. The purpose of Section 302 was to protect the employees upon whose toil the payments were made, without limitation. The Court below erred in its interpretation and understanding of the statute.

The petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

2.

Within twenty (20) days after service of the Summons and Complaint and simultaneously with service of the Answer, Defendants served its notice to take depositions of the Plaintiff together with subpoenas. Plaintiff then moved to vacate the said notice and subpoenas on the ground that

orderly procedure dictated that the Plaintiff first conduct its examination as much of the facts in support of the Complaint were within the knowledged and control of the defendants. This motion was denied on the ground that defendants earlier service of the notice entitled it to the first right to take depositions (R498-531).

After the defendant, Joint Board completed its depositions, but before Plaintiff could commence taking depositions, the motion for summary judgment was made by defendant, Joint Board, accompanied by a stay of all depositions. The obvious purposes were to deprive Plaintiff of its opportunity to examine defendants and to withhold the information which would have supported the Complaint (R11(a), 12(a)).

The circumstances in the case at bar meet the intended purposes of Rule 56(f) and the consideration of the defendants motion for summary judgment was premature and in contravention to the provisions of Rule 56(f). This Rule has been consistently followed by the Courts in cases of this kind and the motions for summary judgment have either been deferred pending completion of depositions by the party opposed thereto or have been denied. Succinctly put was this precept in *Hummel* v. *Riorden* (N. D. Ill., 56 F. Supp. 983) where the Court said per LaBuy, D. J.:

> "Under Federal Rules of Civil Procedure, Rule 56(f) 28 USCA following section 723c, with reference to the entry of summary judgment, it is provided that: 'Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to

be taken or discovery to be had or may make such other order as is just.' The Court is of the opinion that under the circumstances in the present case and under the facts stated that the above rule should be applied herein and the application for judgment refused."

The funds are within the control and supervision of the defendants. The defendants alone knew which employees had been granted benefits and which employees had been rejected as not being "covered employees". The defendants alone knew the workings of the funds. The defendants knew that employees who were not members of the Union and who were not represented by the Union were not "covered employees". Defendants knew that such employees had not been allowed any benefits at any time and that neither families nor dependents of such employees would ever receive any benefits from the funds. However, the specific instances of denial of such benefits and the specific workings of the funds were within the exclusive knowledge and control of the defendants. This information is essential to the matter at hand and depositions should have been allowed to proceed.

Rule 56(f) of the Federal Rules of Civil Procedure is intended to prevent this very unjust and inequitable condition which the Union is attempting to create. Rule 56(f) reads as follows:

"(f) WHEN AFFIDAVITS ARE AVAILABLE. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Moore's Federal Practice, Vol. 6, p. 2345, comments on Rule 56(f) as follows:

> "A typical situation for the application of Rule 56(f) is where the opposing party cannot then present by affidavit facts essential to justify his opposition, because knowledge of these facts is exclusively with or largely under the control of the moving party."

In *Whitaker* v. *Coleman* (CCA 5th, 115 F. 2d 305), the Court said upon appeal from the granting of a motion for summary judgment, through Hutcheson, C. J.:

> ". . . Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists. Rule 56 is carefully drawn to effectuate this purpose. Subdivisions (a) and (b) provide for the institution of the procedure. Subdivisions (c) and (d), the one for complete, the other for partial determination of the existence of genuine issues as to material facts, Subdivision (e) provides for affidavit and other forms of proof while Subdivision (f), making it further clear that the judgment is to be rendered only where it clearly appears that there is no issues, provides for the granting of a continuance to obtain proofs which appear to be existent but not then available. It is quite clear that technical rulings have no place in this procedure and particularly that exclusionary rules will not be applied to strike, on grounds of formal defects in the proffer, evidence proffered on tendered issues. While therefore, it

> does not appear from the record that the transcript of Jones' testimony was in any manner defective or why its offer was refused, this certainly apprised the judge that there was relevant and important evidence which defendant-appellant could and would tender on the trial and notwithstanding this, he was refused a continuance to get the evidence and the matter was pressed at once and erroneouly to summary judgment."

In the case at bar, it is submitted that the Defendants sought to use the summary judgment procedure to trap plaintiff in its toils and deprive it of a trial, precisely the thing condemned by the opinion in the *Whitaker* case (*supra*).

Defendants, as the moving party for summary judgment, have the burden of proof to establish the absence of a genuine issue of fact. This the Defendants have failed to do. The concession that the employees were not covered employees and that the employer was not a covered employer and that the employees did not benefit from any Fund, does not satisfy the issues of fact raised by the pleadings. There are substantial facts which remain to be determined during the course of depositions and at trial. The fact that Defendants demanded and received monies *knowing* that such monies would not and could not be used for the sole and exclusive benefit of such employees and the fact that these monies were never intended for health and welfare benefits for the employees, are among the facts and issues to be determined as a result of depositions and trial.

With regard to the issues still extant, Plaintiff has but limited access to the facts which are within the sole and complete knowledge of the Defendants and which would have been developed by depositions. It is incumbent upon

the moving party to establish that there are no genuine issues of material fact extant. This Defendants have not done and it was error for the Court below to have granted summary judgment.

The rule as to burden of proof is best stated in Moore's Federal Practice. We cite from Moore's and respectfully recommend this Court to the wealth of cases which are in the footnotes in support of this Rule (Vol. 6, Par. 56.15 (3), page 2123):

> "The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. Since it is not the function of the trial court to adjudicate genuine factual issues at the hearing on the motion all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion. And the papers supporting movant's position are closely scrutinized, while the opposing papers are indulgently treated, in determining whether the movant has satisfied his burden."

Issues of fact remain. They can only be ascertained by way of depositions before trial. Defendant's motion was premature and it should have been denied.

In summary judgment, the moving party is entitled to judgment as a matter of law only when it is clear as to where the truth is and where no genuine issue remains

for trial (*Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620). In the *Sartor* case, this Court wrote as follows:

> "It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined, after trial, in the regular manner."

In the Second Circuit, the Circuit Court of Appeals has cautioned against summary judgment. It held that a plaintiff should not be deprived of its right to cross-examination and trial on affidavits. In *Colby* v. *Klune* (178 F. 2d 872), Judge Frank wrote:

> "We have in this case one more regrettable instance of an effort to save time by an improper reversion to 'trial by affidavit', improper because there is involved an issue of fact, turning on credibility. Trial on oral testimony, with the opportunity to examine and cross-examine witnesses in open court, has often been acclaimed as one of the persistent, distinctive, and most valuable features of the common-law system. For only in such a trial can the trier of the facts (trial judge or jury) observe the witnesses' demeanor; and that demeanor—absent, of course, when trial is by affidavit or deposition—is recognized as an important clue to witness' credibility. When, then, as here, the ascertainment (as near as may be) of the facts of a case turns on credibility, a triable issue of fact exists, and the granting of a summary judgment is error. It did not cure the error that each side moved for such a judgment in its favor."

In the case at bar, Plaintiff did not have an opportunity to examine the Union before trial concerning matters within their exclusive control. Without such information the Dis-

trict Court could not pass upon the propriety of the motion for summary judgment since it did not have available the facts which Plaintiff would have elicited by deposition. The Union offered tomelike affidavits containing much of the transcript of the deposition of Plaintiff's witnesses. Plaintiff, by reason of the stay, did not have the opportunity to submit affidavits based upon testimony of the Unions by which to establish not only its case but the existence of material facts in issue in opposition to the motion for summary judgment.

The Union sought determination upon affidavits based upon depositions of Plaintiff's witnesses and have stayed the commencement of depositions of their own witnesses. By so doing they have continued in obscurity the evidentiary matter which will support the allegations of the complaint. Under these circumstances it cannot be said that the moving Defendants even approached sustaining the burden required of them before their motion can be granted.

The Court below erred in granting the motion in light of Defendants' obvious failure to demonstrate the absence of any genuine issue of material fact.

We respectfully submit to this Court that the granting of Defendant Unions' motion for summary judgment was premature and was in violation of due process of law.

VIII.

Petitioner, plaintiff below, respectfully submits that the confusion created by the decision of the United States District Court for the Southern District of New York and by its affirmance in the Circuit Court is unwarranted where the statute here is clear and unambiguous and where the legislative history is in support of the clear and unambiguous language of the statute.

Petitioner therefore respectfully prays that the Court exercise its supervisory jurisdiction to resolve the substantial question raised by the issues herein and by the decision below and that this petition for a writ of certiorari be granted.

Respectfully submitted,

FELLNER AND ROVINS, Esqs.,
Attorneys for Petitioner

June 5, 1962

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Appendix A.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 217—September Term, 1961.

(Argued February 23, 1962 Decided March 9, 1962.)

Docket No. 27221.

BUDGET DRESS CORP.,

Plaintiff-Appellant,

against

JOINT BOARD OF DRESS AND WAISTMAKERS' UNION OF GREATER NEW YORK AND ITS CONSTITUENT LOCALS, and CHARLES S. ZIMMERMAN, NATHANIEL M. MINKOFF and LEON NAMENWIRTH, individually and as GENERAL MANAGER, SECRETARY-TREASURER and PRESIDENT, respectively, of the JOINT BOARD OF DRESS AND WAISTMAKERS' UNION OF GREATER NEW YORK; THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO; and THE POPULAR PRICED DRESS MANUFACTURERS' GROUP, INC.

Defendants-Appellees.

Before:

MOORE, FRIENDLY and MARSHALL,
Circuit Judges.

Appeal from summary judgment of the United States District Court for the Southern District of New York, Sylvester J. Ryan, Chief Judge. Plaintiff appeals from

an order dismissing its action to recover monies allegedly paid in violation of the Labor-Management Relations Act.

Affirmed.

MORRIS J. FELLNER, New York, N. Y. (Fellner & Rovins, on brief), for Appellant.

EMIL SCHLESINGER, New York, N. Y. (Schlesinger & Bloom, on brief), for Appellees Joint Board, *et al.* (Morris P. Glushien, on brief), for Appellee ILGWU (Phillips, Nizer, Benjamin, Krim & Ballon, on brief), for Appellee, Popular Association.

PER CURIAM:

Appellant seeks to recover monies paid into certain health, welfare and retirement funds on the grounds the payments violated section 302 of the Labor-Management Relations Act, 29 U. S. C. A. §186. On the basis of *Minkoff v. Scranton Frocks, Inc.*, 181 F. Supp. 542, *aff'd per curiam* 279 F. 2d 115 (2 Cir. 1960) and the opinion of Chief Judge Ryan in the present case insofar as it deals with the merits of appellant's claim under Section 302, we affirm.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 158

BUDGET DRESS CORP.,

Petitioner,

against

JOINT BOARD OF DRESS AND WAISTMAKERS' UNION OF GREATER NEW YORK and its Constituent Locals, and CHARLES S. ZIMMERMAN, NATHANIEL M. MINKOFF and LEON NAMENWIRTH, individually and as General Manager, Secretary-Treasurer and President respectively, of the JOINT BOARD OF DRESS AND WAISTMAKERS' UNION OF GREATER NEW YORK; THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION AFL-CIO; and THE POPULAR PRICED DRESS MANUFACTURERS' GROUP, INC.,

Respondents.

Respondent's Brief in Opposition to Petitioner's Application for a Writ of Certiorari

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
The Questions Presented for Review	2
The Statute Involved	2
Statement	2
Provisions of the Collective Agreements Pertinent to This Proceeding	3
The Payments in Issue	6
Budget's Misstatement of the Record	11
ARGUMENT:	
I. The courts below properly held that none of the payments made by Budget to the Funds violated Section 302(a) or (b) of the Taft-Hartley Act and that they were exempt therefrom under the provisions of Section 302(c)(2) and (5) thereof	20
II. The motion for summary judgment was not premature. It was timely made and was properly entertained	27
III. Budget's action is barred by the doctrines of *res judicata* and collateral estoppel	29
Conclusion	34
Appendix	1b

Authorities Cited

PAGE

CASES:

Abrams v. Macy Park Construction, Inc., 282 App. Div. 922 (N. Y.) 32
Angel v. Bullington, 330 U. S. 183 33
Arroyo v. U. S., 359 U. S. 419 20

Budget Dress Corp. v. Joint Board of Dress and Waistmakers Union, 178 F. Supp. 699 (S. D. N. Y.) 9

Charles Dowd Box Co. v. Courtney, — U. S. —, 7 L. ed. 483 29
Clinton Engines Corp. v. Briggs & Stratton Corp., 175 F. Supp. 390 (E. D. Mich) 33
Colby v. Klune, 178 F. 2d 862 (C. A. 2) 28
Commissioner of Internal Revenue v. Sunnen, 333 U. S. 591 ..... 30, 31, 33
Cromwell v. County of Sac, 94 U. S. 351 33

E. V. Prentice Machine Co. v. Associated Plywood Mills, 252 F. 2d 473 (C. A. 9) 30

Forrish v. Kennedy, 377 Pa. 370 26
Fox Film Corp. v. Muller, 296 U. S. 207 30
Frost v. Bankers Commercial Corp., 194 F. 2d 505 (C. A. 2) 33

Greenstein v. National Skirt and Sportswear Assn., Inc., 178 F. Supp. 681 (S. D. N. Y.) 23, 25

Hall v. Sperry Gyroscope, 130 N. Y. Supp. 2d 505 32
Harper v. Lewis, 186 F. Supp. 285 (D. C. D. C.) .. 26
Hobbs v. Lewis, 159 F. Supp. 282 (D. C. D. C.) 26

Indiana Gas and Chemical Corp., 130 NLRB 1488 . 25, 26

Jandel Furs, 100 NLRB 1390 25

Kennedy v. Silas Mason Co., 334 U. S. 249 28
Klein v. Cross, 319 P. 2d 471 (Cal.) ..... 4 fn., 25, 26

PAGE

Cases (Cont'd):

Kreindler v. Clarise Sportswear Co., 184 F. Supp. 182 (S. D. N. Y.) 23

Larry Jay, Inc., Matter of [Joint Board of Dress and Waistmakers' Union], 3 App. Div. 2d 386 (N. Y.), aff'd 4 N. Y. 2d 912 23

Lewis v. Hixson, 174 F. Supp. 241 (W. D. Ark.) .4 fn., 25

Lewis v. Mill Ridge Coals, Inc., 188 F. Supp. 4 (E. D. Ky.), aff'd 298 F. 2d 552 (C. A. 6) 23, 28

Lewis v. Quality Coal Corp., 270 F. 2d 140 (C. A. 7), cert. den. 361 U. S. 929 26

Local 138, Int'l Union of Operating Engineers, 123 NLRB 1393 25

Local 174, Teamsters v. Lucas Flour Co., — U. S. —, 7 L. ed. 593 29

McCarroll v. Los Angeles County District Council, 315 P. 2d 322 (Cal.), cert. den. 355 U. S. 932 ... 29

Minkoff v. Budget Dress Corp., 180 F. Supp. 818 (S. D. N. Y.) 9

Minkoff v. Budget Dress Corp, NYLJ May 11, 1960, p. 12, col. 4 10

12 App. Div. 2d 905 (N. Y.), 214 N. Y. Supp. 2d 242 ..... 10, 16

13 App. Div. 2d 641 (N. Y.), 215 N. Y. Supp. 2d 1012 ..... 10, 16

13 App. Div. 2d 751 (N. Y.), 216 N. Y. Supp. 2d 659 ..... 10, 16

9 N. Y. 2d 613 ..... 10, 16

Minkoff v. Scranton Frocks, 181 F. Supp. 542 (S. D. N. Y.), aff'd 279 F. 2d 115 (C. A. 2) ...22, 24, 25

Minkoff v. Scranton Frocks, 172 F. Supp. 870 (S. D. N. Y.) 29

Motion Pictures Operators Union, Local 244, 126 NLRB 376 25

New York Life Ins. Co. v. Bangs, 103 U. S. 780 ... 33

New York Lumber & Woodworking Co. v. Schneider, 119 N. Y. 475 32

PAGE

CASES (Cont'd):

NLRB v. Local 815, IBT, 290 F. 2d 99 (C. A. 2) .. 25, 26

Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U. S. 89 ..... 31; 33

Poller v. Columbia Broadcasting System, — U. S. —, 7 L. ed. 458 28

Ray v. Hasley, 214 F. 2d 366 (C. A. 5) 33

Ruth v. Lewis, 166 F. Supp. 346 (D. C. D. C.) 26

Sartor v. Arkansas Natural Gas Corp., 321 U. S. 620 28

Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp., 250 N. Y. 304 ..... 30, 31

Statter v. Statter, 2 App. Div. 2d 81 (N. Y.) 31, 32

Szuck v. Lewis, 193 F. Supp. 831 (D. C. D. C.) ... 26

Textile Workers Union v. Lincoln Mills of Alabama, 353 U. S. 448 29

U. S. v. Annunziato, 293 F. 2d 373 (C. A. 2) 20

U. S. v. Embassy Restaurant, Inc., 359 U. S. 29 .. 4 fn.

Van Horn v. Lewis, 79 F. Supp. 541 (D. C. D. C.) . 21

Williams v. Green Bay & W. R. Co., 68 F. Supp. 509 (S. D. N. Y.) 33

TEXTS:

Restatement of the Law of Judgments, § 61, p. 240 31

STATUTES:

28 U. S. C. § 1254(1) 2

28 U. S. C. § 1257(3) 30

28 U. S. C. § 2101(c) 30

National Labor Relations Act, as amended:
Section 302 (29 U. S. C. 186) 2

Taft-Hartley Act:
Section 8 (29 U. S. C. 158) 26

PAGE

STATUTES (Cont'd):

Section 301 (29 U. S. C. 185) ..... 29 fn.

Section 302(a) and (b) (29 U. S. C. 186[a] and [b]) 9, 10, 21, 26, 30, 32

Section 302(c) 21

Section 302(c)(2) (29 U. S. C. 186[c][2]) 21, 23

Section 302(c)(5) (29 U. S. C. 186[c][5]) ..11, 14, 21, 22, 23, 24

Section 302(g) (29 U. S. C. 186[9]) 24

CONGRESSIONAL RECORD:

93 Cong. Rec. 4876 (May 8, 1947) 22fn

IN THE

Supreme Court of the United States

October Term, 1962

No. 158

BUDGET DRESS CORP.,

Petitioner,

against

JOINT BOARD OF DRESS AND WAISTMAKERS' UNION OF GREATER NEW YORK and its Constituent Locals, and CHARLES S. ZIMMERMAN, NATHANIEL M. MINKOFF and LEON NAMENWIRTH, individually and as General Manager, Secretary-Treasurer and President respectively, of the JOINT BOARD OF DRESS AND WAISTMAKERS' UNION OF GREATER NEW YORK; THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION AFL-CIO; and THE POPULAR PRICED DRESS MANUFACTURERS' GROUP, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

Opinions Below

Petitioner seeks to review the judgment of the Court of Appeals for the Second Circuit unanimously affirming a summary judgment in favor of Respondents and against Petitioner. The opinion of the District Court (R. 54a-68a), is reported at 198 F. Supp. 4. The opinion of the Court of Appeals (Petition, Appendix A, pp. 1a-2a) is reported at 299 F. 2d 936.

Jurisdiction

Jurisdiction of this Court is bottomed on 28 U. S. C. Section 1254(1). The judgment sought to be reviewed is dated March 9, 1962 and was entered on said date. No application was made for a rehearing and no extension of time was granted within which to petition for certiorari.

The Questions Presented for Review

The first two questions which the petition presents for review lack validity. This is so because they assume facts which were thoroughly disproved in the Courts below by documentary evidence, and contain alleged "concessions" which were never made by Respondents and which are not supported in the Record. We believe that this Court will not review hypothetical questions of law based on statements of hypothetical facts.

The third question which the petition presents for review also lacks validity in the circumstances of this case for the reasons hereinafter stated.

The Statute Involved

The pertinent provisions of Section 302 of the National Labor Relations Act, as amended (29 U. S. C. § 186) are set forth in the Appendix annexed to this brief (pp. 1b-2b).

Statement

Petitioner (hereinafter referred to as "Budget") is a dress jobber. It was in contractual relations for more than 20 consecutive years with Respondents Joint Board of Dress and Waistmakers' Union of Greater New York and its parent body, International Ladies' Garment

Workers' Union (hereinafter collectively referred to as the "Union"), by reason of its membership in The Popular Priced Dress Manufacturers' Group, Inc. (hereinafter referred to as the "Association"), to which it and other members of the Association had delegated the power to negotiate collective agreements on their behalf and had agreed to be bound by the agreements finally consummated (R. 25b-26b; 145b-146b; 16a). It resigned from the Association in December 1957 but continued to be bound under its agreement with the Union until January 31, 1958.

During all of this time, Budget employed *in its own shop on its own premises,* cutters, operators and finishers over whom it had direct control (Ex. 43[1]; R. 104b-105b; 119b; 146b-148b). It engaged these workers; it assigned the work to them; it supervised them to insure that the dresses they worked on were made in accordance with prescribed specifications; it had the right to fire them for cause; it paid them their wages directly. However, Budget manufactured the bulk of its production in the shops of contractors.

Provisions of the Collective Agreements Pertinent to this Proceeding

The collective agreements under which Budget was bound provided, among other things, that

(a) a jobber could also manufacture its garments in the shops of contractors but only in such shops as were in contractual relations with the Union,[2] and only in so many of them as it actually required. All that the jobber

[1] The exhibits submitted by Respondents to the District Court and to the Court of Appeals are contained in a separately bound photographic album. A copy thereof has been filed with this Court and constitutes part of the Record (R. 113b). Reference to the exhibits contained therein is made as "Ex." followed by the number of the exhibit in this bound volume.

[2] Ex. 4, p. 6; Ex. 5, p. 6.

was required to do was designate them with the Union.[3] Contractors were forbidden to sub-contract;

(b) a jobber was required, when there was insufficient work to supply all of the workers in its inside shop and in the shops of its permanent union contractors with full time employment, to distribute the work equitably to and among them;[4]

(c) a jobber was required to pay to the Health and Welfare Fund, which was created by the 1944 collective agreement, and to the Retirement Fund, which was created by the 1947 collective agreement, a stated percentage of the payrolls of the workers employed in its inside shop and in the shops of its contractors.[5] Different trade unions use different measuring rods as a basis for fixing the amount of the employer's liability. The Mine Workers Fund measures the obligation by a fixed royalty per ton of coal mined;[6] the Restaurant Workers Fund by a fixed sum per month per full time employee;[7] and the Bakery and Confectionery Workers Fund by a specified sum for each hour worked.[8] In this regard, Congress imposed no limitation upon the parties to a collective agreement. It left them free to select any measuring rod upon which they could agree.

Although the parties, by the collective agreement, undertook to establish the basis of the jobber's obligation to the Funds, they recognized that this basis might prove

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[3] Ex. 4, p. 12; Ex. 5, p. 12.

[4] Ex. 4, p. 16; Ex. 5, p. 16.

[5] Contractors were not required to contribute to the Funds (except where they manufactured garments for non-union jobbers, in which event, they were required to make the same percentage payments which the jobber would otherwise have been required to make) nor were the workers in the shops of jobbers, manufacturers or contractors required to make contributions thereto (R. 40b).

[6] *Lewis* v. *Hixson*, 174 F. Supp. 241 (WD Ark.).

[7] *U. S.* v. *Embassy Restaurant, Inc.*, 359 U. S. 29.

[8] *Klein* v. *Cross*, 319 P. 2d 471 (Cal.).

unworkable. Accordingly, they empowered the Impartial Chairman to determine a different basis by providing that payments to the Funds be

> "computed, reported and made in the manner to be promulgated by Harry Uviller, Esq., as Impartial Chairman, which promulgation when made, shall be deemed incorporated herein, made a part hereof and binding upon each member of the Association."[9]

Pursuant to this provision, the Impartial Chairman issued his promulgations (Exs. 9, 10, 11 and 12), in which he required that jobbers and manufacturers pay to the Funds a stated percentage of *wages paid to workers in their inside shops* and a lesser stated percentage on the *total payments* (inclusive of wages, overhead and profit) *made by them to their contractors.*[10] This, then, became the basis of the jobber's obligations to the Funds and the measuring rod by which the amount of the obligation was to be arithmetically computed;

d) The Union was named as the proper party in interest to enforce payments due to the Funds.[11] All monies paid over to the Union by Budget, for the benefit of the Funds, were turned over to the Funds (Ex. 18). Budget does not contend otherwise;

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[9] Ex. 5, p. 32. See also Ex. 4, p. 30.

[10] Ex. 43 consists of the two sets of reports which Budget was required to submit to the Funds each month. These show clearly the two separate bases upon which Budget made payments to the Funds. One set of reports covered the workers in its inside shop. It set forth the name, craft, social security number and weekly wage of each worker employed by it. Payments to the Funds were computed upon the agreed percentage of the wages paid to these workers. The other set of reports merely shows the total amounts paid by Budget to its contractors and the payments made to the Funds thereon based upon the percentage of total payments fixed in the promulgations of the Impartial Chairman.

[11] Ex. 4, p. 34; Ex. 5, p. 38.

(e) the Union had the right to examine a jobber's books once a month to ascertain whether such jobber was fully complying with the agreement;[12] and

(f) all complaints, disputes or grievances involving questions of interpretation or application of the agreement or any acts, conduct or relation of the parties were to be submitted to arbitration before Harry Uviller, Esq., as Impartial Chairman, and his decision was final and binding.[13]

The Payments in Issue

Over the years, Budget utilized the services of many union contractors, both permanent and temporary, and made innumerable payments to the Funds on total payments made to these contractors, in accordance with the promulgations of the Impartial Chairman. However, this case actually involves only three payments.

1. The first payment is the subject of the first cause of action in Budget's complaint (R. 2a-5a). It concerns an alleged payment of $49,000[14] to the Funds which was calculated on the total payments made by Budget to certain *non-union* contractors during the period March 1954 through May 1957. That payment was made under the following circumstances:

In May, 1957, after Budget's strenuous efforts in the courts to evade examination of its books and records had met with defeat (R. 67b-70b), the Union finally examined them. It was ascertained that Budget, in violation of the collective agreement, had manufactured tens of thousands of its garments in the shops of non-union contractors, in-

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[12] Ex. 4, p. 36; Ex. 5, p. 43.

[13] Ex. 5, p. 42; Ex. 5, p. 49.

[14] It is conceded that the claimed payment of $49,000 is incorrect and that the actual payment made was $44,000 (R. 162b-165b; 177b; 183b; 185b; Exs. 25, 26, 27 and 28).

cluded among which were State Fabrics and Sano Textile, and had concealed the payments made to these non-union contractors by listing them in its books of account under the heading "Materials Purchased". Of course, Budget had made no payments to the Funds on this production.

The Union filed complaints against Budget (Exs. 14, 23, 24) pursuant to the arbitration provision of the collective agreement (Ex. 5, p. 49), demanding a total of $76,384.26 claimed to be due to the Funds.

While hearings were pending, Budget and the Union entered into a stipulation (Ex. 25), in which Budget expressly recognized and affirmed the jurisdiction of the Impartial Chairman and authorized him to determine the amount and the manner in which payment thereof was to be made.

Thereupon, the Impartial Chairman, on October 1, 1957, rendered an award (Ex. 26) directing Budget to pay to the Union, for the benefit of the Funds, the sum of $49,000, of which $25,000 was to be paid immediately and the balance of $24,000 in 24 monthly installments of $1,000 each to be paid on the 15th day of each and every month commencing November 15, 1957, to be evidenced by 24 promissory notes. Following a personal appeal by Rosengarten, the Secretary-Treasurer of Budget, the Impartial Chairman decreased the award to $44,000 and reduced the initial payment to $20,000. This was consented to (Ex. 27). Budget made the down payment of $20,000 by certified check payable to the order of "Health & Welfare Fund" (Ex. 28) and delivered its 24 promissory notes to the Union. Each of these notes was paid and the proceeds thereof received by the Funds (R. 67b-79b; Ex. 18F).[15]

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[15] The instant action was commenced on August 6, 1959 (R. 1a). On that date, at the latest, Budget had advanced its claim that the payments were illegal. It is the measure of Budget's bad-faith that it voluntarily paid the notes due on August 15, September 15 and October 15, 1959, *after* the claim of illegality had been asserted. These payments were actually received by the Funds on August 21, September 21, and October 29, 1959 (Ex. 18F).

2. The second payment is the subject of both causes of action in Budget's complaint.[16] It concerns an alleged payment of $22,000[17] to the Funds which was calculated on the total payments made by Budget to its *union* contractor, Harvic Sportswear Co., for the period June 1957 through January 31, 1958, and was made under the following circumstances:

An examination of Budget's books made *after* January 31, 1958, but limited to the period ending January 31, 1958 (the date after which Budget was no longer bound by the collective agreement), disclosed that Budget had failed to make proper payments to the Funds on total payments made by it to Harvic Sportswear for the period June 1957 through January 1958. Accordingly, the Union filed an additional complaint against Budget. It demanded payment of the sum of $18,535.21 claimed to be due to the Funds on total payments made by Budget to Harvic for this period.

On September 30, 1958, the Impartial Chairman rendered an award (Ex. 29), requiring Budget to pay to the Funds the sum of $17,480.97. By order and judgment dated April 16, 1959 (R. 80b-82b; Ex. 30), the award was confirmed by the New York Supreme Court. Budget appealed therefrom to the Appellate Division, First Department. However, it did not prosecute its appeal and on motion of the Union the appeal was dismissed on September 17, 1959 (R. 79b-82b, 94b; Ex. 31).

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[16] The award of the Impartial Chairman and the judgment of the New York Supreme Court confirming the award were rendered before the institution of this action. However, the judgment was not paid until after this action was commenced, and then only after an application for an injunction under the second cause of action herein had been denied under circumstances hereinafter set forth. By consequence, it is the subject of both causes of action.

[17] It is conceded that the claimed payment of $22,000 is incorrect and that the actual payment made was $17,480.97 (R. 177b; 183b; 185b; Exs. 29, 30, 31 and 33).

In the interim, and on August 6, 1959, Budget commenced the instant action in the United States District Court for the Southern District of New York. After dismissal of Budget's state court appeal, the Union made demand upon the surety on Budget's appeal bond for payment of the judgment. Budget thereupon moved in the present action for an injunction, under the second cause of action in the complaint, to prevent payment of the judgment by the surety on the ground that such payment constituted a violation of Section 302(a) and (b) of the Taft-Hartley Act. Chief Judge Ryan denied the injunction in an opinion reported at 178 F. Supp. 699. Budget appealed therefrom to the Court of Appeals. After Judge Ryan had denied a motion for a stay pending appeal (R. 83b), and the Court of Appeals for the Second Circuit had denied a similar motion (R. 84b; Ex. 32), Budget abandoned its appeal and the surety issued its check in payment of the judgment (R. 84b; Ex. 33). As the Funds' ledger sheets indicate, this payment was received by the Funds (R. 79b-86b; Ex. 18H).

3. The third payment is the subject solely of the second cause of action in Budget's complaint. It concerns a payment of $13,759.49 to the Funds which was calculated on total payments also made by Budget to Harvic Sportswear Co., its *union* contractor, for the months of January 1955 to June 1957. Here again discovery of the failure to make the payments due to the Funds took place after the collective agreement had expired. The Union filed its complaint which was heard by the Impartial Chairman, after a motion to stay arbitration had been denied and an appeal therefrom to the Appellate Division, First Department, had been dismissed (R. 93b-94b). On June 29, 1959, the Impartial Chairman rendered his award (Ex. 38), requiring Budget to pay to the Funds the sum of $13,759.49. The Union moved, in the New York Supreme Court, to confirm the award. Budget removed that proceeding to the federal court. The Union's motion to remand to the state court was granted (180 F. Supp. 818). On the evening before the Union's renewed motion to confirm the

award came on to be heard in the New York Supreme Court, Budget filed an unfair labor practice charge with the National Labor Relations Board against the Union (Ex. 40), and on the basis thereof, cross-moved in the state court for a stay (Ex. 39). It also opposed confirmation of the award upon the ground, among others, that the payment required to be made by the award violated Section 302(a) and (b) of the Taft-Hartley Law. On May 10, 1960, the motion to confirm was granted and the cross-motion to stay denied (N. Y. L. J., May 11, 1960, p. 12, col. 4; Ex. 41). Budget's unfair labor practice charge was shown to be spurious and Budget withdrew it (Ex. 42; R. 88b-98b).

Budget appealed to the Appellate Division, First Department, from the judgment of confirmation, relying *solely* upon the claim that the payment required to be made by the judgment violated Section 302(a) and (b) of the Taft-Hartley Law.[18] The judgment was unanimously affirmed (12 App. Div. 2d 905 [N. Y.], 214 N. Y. Supp. 2d 242). Leave to appeal to the New York Court of Appeals was denied first by the Appellate Division (13 App. Div. 2d 641 [N. Y.], 215 N. Y. Supp. 2d 1012; 13 App. Div. 2d 751 [N. Y.], 216 N. Y. Supp. 2d 659) and then by the Court of Appeals (9 N. Y. 2d 613). Thereupon, the judgment was paid.

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[18] The briefs submitted to the Appellate Division by Petitioner and the Union were before Chief Judge Ryan when he decided the motion for summary judgment. Since Respondents did not have additional copies of Petitioner's brief, Respondents submitted only 3 copies of the Union's Appellate Division brief to the Circuit Court of Appeals. We submit, together with this brief, three copies of that brief to this Court. Page 2 of that brief indicates that Budget, in its statement of the issues on appeal, limited itself *exclusively* to a discussion of whether the payment required to be made by it to the Funds violated Section 302 of the Taft-Hartley Act.

Budget's Misstatement of the Record

Budget, apparently, has now abandoned the claim advanced by it in the Courts below that issues of fact exist in this case. However, in the effort to find some basis for the question of law which it seeks to advance, it misstates, in its Petition much of the documentary evidence, it ignores the concessions made by its officers upon the taking of their depositions, and it completely garbles the stipulation made by Respondents.

1. Budget states that the Union "acknowledged below that none of the employees upon whose toil and wages the payments demanded and received were based could derive benefits from any health and welfare funds administered by the Union" (Petition, pp. 4-5), and that the employees of the paying employer [*i. e.* Budget] were not beneficiaries of the Funds (Petition, p. 10).

(a) In the first place, as we have already shown, Budget concededly made payments to the Funds on the wages of the workers in its inside shop. All of the workers in the crafts covered by the collective agreement employed directly by Budget in its inside shop were "covered workers" employed by a "covered employer" as those terms are defined in the Rules and Regulations of the Funds.[19] As such they were entitled to and, in fact, did receive all of the benefits for which they were eligible. Budget does not contend otherwise. Consequently, Section 302(c)(5) was fully satisfied because the monies collected from Budget were used to provide benefits for its own employees, directly employed in its inside shop.

The Funds also extended benefits to all workers in the crafts covered by the collective agreement who were eligible therefor who were employed in the shops of contractors in contractual relations with the Union. These workers are also defined as "covered workers" in the Rules and

[19] Ex. 7, pp. 3-4; Ex. 8, pp. 3-4.

Regulations of the Funds and their employers are defined as "covered employers". The reason for doing so is that the collective agreement gives special protection to the workers employed in the shop of a union contractor. It imposes responsibility on the union *jobber* (a) for payment of the guaranteed minimums payable to all piece workers in the shops of his union contractors (Ex. 4, p. 27; Ex. 5, p. 28); (b) for payment of wages to the workers in the shops of his union contractors provided that such responsibility is limited to wages for one full week and two days and provided further that notice of default is given within three days after default in payment of such wages by the union contractor (Ex. 4, p. 27; Ex. 5, p. 28); and (c) for under-payments in wages due from the union contractor to his workers (Ex. 4, pp. 27-28; Ex. 5, pp. 28-29). It is, therefore, eminently fair and proper that the Fund should also give special protection to the workers employed in the shops of union contractors by providing benefits for them. Thus, the workers in the shops of Budget's *union* contractors, *i.e.*, the workers in the shops of A. Kelmar, Max Stone and Harvic Sportswear Co., were "covered workers" employed by "covered employers" and they became entitled to and did receive benefits from the Funds (R. 119b, 133b).

All other payments which Budget made to the Funds were not based on the wages of the workers in its contractors' shops, but, as we have shown, were made on the total payments which Budget paid to each of its contractors, in accordance with the promulgations of the Impartial Chairman, and without regard to the wages earned by the workers in its contracting shops.

Concededly, the workers in Budget's contracting shops were not Budget's workers. In his deposition, Rosengarten admitted that none of the workers employed in any of the shops of its contractors were employees of Budget and conceded that they were the employees of the owners of the contracting shops in which they worked (R. 170b-

177b). Budget could not hire or fire them; it could not determine their work load; it could not and did not exercise any degree of supervision over them; it did not pay them their wages or earnings. It did not know the names of the persons employed by any of its contractors and never knew what they earned or what they were paid. In fact, Rosengarten, who was subpoenaed to produce lists of the workers in the shops of State Fabrics and Sano Textile in connection with his deposition, conceded that he did not have any such records and that the lists which he produced he had obtained from the contractors in question only after the subpoena had been served upon him R. 204b-206b). Indeed, as can be seen from the lists of workers of Sano Textile,[20] the wages paid to these workers were blocked out and Rosengarten conceded that they were so blocked out when they were delivered to him (R. 105b-107b). Thus, it is plain that Budget never made payments to the Funds on the wages of the workers in its contracting shops for it never knew what those wages were.[21]

None of the reasons for giving benefits to workers employed in Budget's inside shop exists for giving benefits to workers employed in the shops of its non-union contractors. Since the collective agreement contemplated that the jobber could manufacture his garments only in the shops of union contractors, and for him to do otherwise would be a violation of the agreement for which he would be liable in damages, the jobber was not asked for and did not give similar guarantees with respect to the workers in the shops of his non-union contractors. Moreover, the workers in the shops of non-union contractors who produced garments for union jobbers were actually depriving the workers in union contracting shops of the work, wages and earnings to which they were entitled. It would be patently

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[20] Exs. 46, 47, 48 and 49.

[21] Frank, the President of Budget, conceded that the payments to the Funds were not based on wages paid to workers in Budget's contracting shops (R. 210b-211b).

absurd to give the workers in the non-union contracting shops benefits from the Funds as a premium for that conduct.

Therefore, the workers in the shops of Budget's non-union contractors were not made "covered workers" and were not employed by "covered employers." Hence, they were not entitled to and did not receive benefits from the Funds.

(b) In the second place, the reference to "health and welfare funds administered by the Union" is a patent misstatement. Under the collective agreement (Ex. 5, pp. 34-38), the Funds are set up and administered in strict compliance with Section 302(c)(5) of the Taft-Hartley Law. They are jointly administered by representatives of management and labor and are presided over by a neutral person who is empowered to break deadlocks (R. 32b-33b). The Funds also comply meticulously with all other applicable statutes (R. 31b-40b).

None of the monies of the Funds are used except to pay benefits authorized under Section 302 of the Taft-Hartley Law to eligible workers and to pay the administrative and operating expenses thereof (R. 31b-33b; 134b-135b; Ex. 5, p. 33).

2. Budget states that each month during the term of the agreement it filed with the Union a list showing the contractors with whom it had worked during the previous month and the amount of work done in each contracting shop, together with a check representing *a percentage of the wages earned by the workers* in each contracting shop during such month (Petition, p. 7). This statement is untrue. The reports (Ex. 43) themselves show that Budget never made payments to the Funds *on wages paid to workers in contracting shops,* and that, in fact, it made them *on the total payments* made to the contractors themselves.

3. Budget states that it had obtained the consent of the Union to work with non-union contractors as long as it made payments to the Funds on total payments made to these contractors (Petition, p. 8). Not alone is this statement irrelevant, but it is untrue and is utterly refuted by the documentary evidence.

In 1953, Budget violated the collective agreement by manufacturing its garments in the shop of one La Porta, a non-union contractor. Rather than arbitrate the issue, Budget paid $250 in liquidated damages to the Union and agreed not to violate the collective agreement again (R. 70b-71b; 124b; 211b).

When the Union filed the three complaints seeking an award for the Funds based upon Budget's concealment of its dealings with non-union contractors by denominating in its books of account, payments to them as payments for "Materials Purchased", it also filed a complaint charging Budget with dealing with non-union contractors in violation of Paragraph "Ninth" of the collective agreement and demanded damages. On September 18, 1957, the parties entered into a stipulation (Ex. 34),[22] under which Budget agreed to and did pay the Union liquidated damages of $5,000 and consented to the rendition of an award requiring Budget to cease and desist from further violating the collective agreement and further consented to confirmation of the award and the entry of a decree of injunction restraining such violations. The award was rendered on Oc-

[22] At the time of the entry into this stipulation, Budget informed the Union that it had a substantial number of garments in the machines of its non-union contractors and that to transfer these garments to its union contractors for completion would work irreparable injury upon it. The union, as a special dispensation, permitted Budget to complete these garments and agreed that no claim would be made against it therefor (R. 140b). No claim was ever made by the Union for this period. Out of this special favor Budget attempts to weave its entire argument of "consent".

tober 1, 1957 (Ex. 35) and an order of confirmation and decree of injunction was entered by the New York Supreme Court on October 28, 1957 (Ex. 36).

When, for the third time, the Union ascertained that Budget was violating the collective agreement by having its garments made in the shops of non-union contractors, the Union filed still another complaint against Budget demanding damages. The Impartial Chairman awarded damages to the Union in the amount of $38,650 (Ex. 37). This award was confirmed by the same judgment which confirmed the award in favor of the Funds in the amount of $13,759.49. That judgment was unanimously affirmed by the Appellate Division, First Department (12 App. Div. 2d 905 [NY], 214 N. Y. Supp. 2d 242) and leave to appeal to the New York Court of Appeals was denied (13 App. Div. 2d 641 [NY], 215 N. Y. Supp. 2d 1012; 13 App. Div. 2d 751 [NY], 216 N. Y. Supp. 2d 659; 9 N. Y. 2d 613).

Thus, far from consenting to or condoning Budget's dealings with non-union contractors, the documentary evidence makes clear that the Union sought to use every means available to prevent such violations.

4. Budget contends that the monthly reports filed by it with the Funds evidenced the Union's consent to Budget's dealing with non-union contractors. The first report filed with the Funds which bears the names of non-union contractors was the *supplemental* report for *June* 1957 (Ex. 43). This bears the name of State Fabrics and Sano Textile. Since the $44,000 award to the Funds covers the period ending with *May* 1957, it is plain that the reports included by Budget in its appendix (R. 43a, 53a) are not evidence of any such consent.

But even more important, the documentary evidence, consisting of the reports to the Funds (Ex. 43) and the checks issued in payment of the amounts shown by these reports to be due to the Funds (Exs. 16, 17) affirmatively

disproves any such consent. The complaints (Exs. 14, 23, 24) which resulted in the award of $44,000 (Ex. 26) covered monies due to the Funds for the period March 1954 through May 1957. These complaints were disposed of by the award of October 1, 1957 (Ex. 26). In the interim, Budget continued to operate with its non-union contractors. Thus, on October 1, 1957, Budget owed the Funds the stipulated percentage on total payments made to these non-union contractors for the months of June, July, August and September, 1957. The June, 1957, supplemental report (Ex. 43), and the reports for July and August, 1957, together with the checks in payment of the amounts due as shown by these reports (Exs. 16M, 16N, 16O), were submitted to the Funds in the latter part of October, 1957. The checks are all dated October 20, 1957, and, together with the reports, were received by the Funds within a day or two thereafter. The check covering the payment due to the Funds on payments made to these non-union contractors during September, 1957 (Ex. 16P) is dated October 25, 1957, and was received by the Funds, together with the September report, within a day or two thereafter. This should have terminated Budget's non-union operations.

However, Budget did not cease its non-union operations. To shroud them in secrecy, it delayed its reports for the months of October, November and December, 1957 and January, 1958. These were forwarded to the Funds, together with the checks in payment therefor (Exs. 17A, 17B, 17C) on January 23, January 25, and February 28, 1958.[23] By the time these had been received by the Funds and entered in their records and it was too late for the Union to take action other than to seek damages (R. 141b-142b). This, it did. Thus, the documentary evidence, instead of supporting Budget's claim, actually shows that Budget did not have the consent of the Union to its dealing

[23] The expiration date of the collective agreement was January 31, 1958 (see Ex. 5, p. 53).

with non-union contractors and that, because it did not have the Union's consent, it bent every effort to withhold from the Union the knowledge of such dealings.

Moreover, the reports filed by Budget were filed with the *Funds* not with the Union. The material contained in these reports would not and did not come to the Union in the normal course until long after the receipt thereof by the Funds.

But even if the Union had consented to Budget's dealing with non-union contractors (which it did not), and such consent had something to do with the Funds, the only effect thereof would be that in a suit brought by a *worker* employed by any of these non-union contractors to recover benefits from either of the Funds, the Union would be estopped to assert that these non-union contractors were not "covered employers" and these workers then would be entitled to benefits from the Funds (R. 142b). Such a suit, however, could not be brought at the instance of Budget.

5. Budget states that the Union has conceded that (a) the employees were not covered workers; (b) they were not employed by covered employers; and (c) the employees for whom payments were made were not eligible to receive benefits from the Fund (Petition, p. 13). The Union made no such concession. The Record shows that the workers in Budget's inside shop and the workers in the shops of its union contractors were "covered workers" employed by "covered employers" and were eligible for benefits from the Funds and, in fact, did receive all of the benefits to which they were entitled.

The Union did make a stipulation. It is plain, clear and concise and appears at pp. 131b-132b of the Record. It is quite different from Budget's version of it. It was made under the following circumstances: On its appeal to the Appellate Division from the judgment confirming

the Arbitrator's award in the sum of $13,759.49, and upon the oral argument of the motion for summary judgment herein before Chief Judge Ryan, Budget, in the endeavor to raise an issue of fact, contended that although the amounts found to be due to the Funds were paid on total payments made by Budget to Harvic, *its union contractor*, Harvic had subcontracted the work given to it by Budget to non-union contractors, whose workers were not covered workers, and, therefore, Budget's payments to the Funds on the total payments which it made to Harvic were illegal. To obviate the claim that this created an issue of fact, the Union, upon the oral argument of the motion for summary judgment and in its rejoinder affidavit (R. 131b-132b), requested the Court to assume (although it did not concede this to be a fact) that "so far as concerns the two awards in favor of the Funds for $17,480.97 and $13,759.49, based upon total payments made by plaintiff to Harvic, Harvic subcontracted the work given to it by plaintiff to non-union contractors. So far as concerns the award for $44,000, [the Union] requested the Court to assume that this award was based upon total payments made by plaintiff directly to non-union contractors. The Court was further requested to assume that the workers in the shops of these *non-union* contractors were not 'covered workers' and were not employed by 'covered employers', and that, as a result thereof, these workers were not eligible to receive benefits from the Fund." The Union never stipulated that the workers in *Budget's inside shop* and the workers in its *union contracting shops* were not entitled to benefits . As demonstrated by the Record, not only were they "covered workers", entitled to receive such benefits (R. 133b) but, in fact, they did receive them.

ARGUMENT

I. The courts below properly held that none of the payments made by Budget to the Funds violated Section 302(a) or (b) of the Taft-Hartley Act and that they were exempt therefrom under the provisions of Section 302(c)(2) and (5) thereof.

Budget contends that the three payments made by it to the Funds were illegal because they were made on behalf of workers in the shops of its non-union contractors and Harvic's non-union sub-contractors who were not entitled to receive benefits from the Funds. The Union, on the other hand, contends that the payments made were made on behalf of the workers in Budget's inside shop and in the shops of its union contractors—all of whom were "covered workers" as defined in the Rules and Regulations of the Fund. Those payments were to be used jointly with payments of all other "covered employers" making similar payments to provide benefits to their workers. The basis of the payments, i.e., the specified percentage of the wages of the workers in the inside shop and the specified percentage of total payments made to contractors, as set forth in the promulgations of the Impartial Chairman (Exs. 9, 10, 11, 12), was merely a measuring rod to determine arithmetically the precise amount which jobbers were required to pay to these pooled Funds to provide benefits for workers employed in their inside shops and employed by their contractors in union shops.

Congress, when it enacted Section 302, was concerned with practices which violated the integrity of the collective bargaining process. Its purposes were dual. It sought, on the one hand, to protect employers against extortion, and, on the other hand, to insure honest representation to employees (*Arroyo* v. *United States*, 359 U. S. 419; *U. S.* v. *Annunziato*, 293 F. 2d 373 [C. A. 2]).

Although Congress' intention was to insure collective bargaining at arm's length, it recognized that, standing alone, Section 302(a) and (b) would completely disrupt the normal labor-management relationship. To guard against such interference, Congress enacted Section 302(c) which specifies the types of payments which are exempt from the prohibition of Section 302(a) and (b).

The payments here involved fall within two of the exemptions specified in Section 302(c). They are, therefore, legal and valid payments.

1. All three of the payments which form the basis of Budget's suit were made to the Funds in satisfaction of awards of an Impartial Chairman. Two of these awards were confirmed by separate judgments of the New York State Supreme Court. Hence, all of the payments here involved fall within the express ambit of Section 302(c)(2). This, without more, disposes of Budget's contention.

2. Section 302(c)(5) legalizes the payment of monies to trust funds established for the purpose of paying health and welfare benefits and retirement benefits provided that the trusts meet certain conditions. The uncontroverted and incontrovertible facts establish that, however the statute may be parsed, each of the Funds here involved meets each requirement of the statute. Payments made by Budget were held in trust for the sole and exclusive benefit of the workers employed in Budget's inside shop and for the workers of A. Kelmar, Max Stone and Harvic Sportswear Company, Budget's union contractors, jointly with the employees of other employers making similar payments. The payments were used only for the purposes authorized by law (Ex. 5, pp. 33-34). The detailed basis upon which payments were made by the Funds is set forth in the collective agreement and the Rules and Regulations which, together, constitute the written instrument (*Van Horn* v. *Lewis*, 79 F. Supp. 541 [DC DC]. The employees and employers were represented equally in the administration of

the Funds. The Impartial Chairman was designated as the neutral person empowered to break deadlocks. Provision was made for an annual audit and the payments used for the purpose of providing retirement benefits was held in a separate trust which could not be used for any other purpose.

Thus, every single requirement of Section 302(c)(5) is satisfied. Moreover, the Funds comply meticulously with every other statute, state and federal, applicable to them. (R. 32b-33b)

When Congress enacted Section 302, it prescribed standards to assure that welfare funds would be established only for the purposes which Congress considered proper and expended only for the purposes for which they were established.[24]

The validity of the very Funds here in question was involved in *Minkoff* v. *Scranton Frocks* (181 F. Supp. 542 [S. D. N. Y.], aff'd on opinion of the court below, 279 F. 2d 115 [C. A. 2]). There an award in favor of the Funds was attacked upon the very grounds here urged. Counsel for the respective parties were the same, the Rules and Regulations governing eligibility were the same and the facts were substantially similar. In confirming the awards, the Court there held:

> "• • • the Funds here involved can by no stretch of the imagination be considered anything other than legitimate plans to provide benefits for employees in the dress industry covered by the collective bargaining agreements." (181 F. Supp. at p. 549)

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[24] During the debates, Senator Taft stated (93 Cong. Rec. 4876, May 8, 1947): "the purpose of the provision is that the welfare fund shall be a perfectly definite fund, that its purpose shall be stated so that each employee can know what he is entitled to, can go to court and enforce his rights in the fund, and that it shall not be, therefore, in the sole discretion of the union or the union leaders and usable for any purpose that they may think is to the advantage of the union or the employee."

The reasons for the legality of Budget's payments to the Funds are multiple.

First: The Record shows that the Funds herein have been set up and are administered in meticulous compliance with Section 302(c)(5) of the Taft-Hartley Act.

Second: Payments to a fund which meet the requisite criteria of Section 302(c)(5) of the Taft-Hartley Act are legal because it is so provided therein; when made in satisfaction of a judgment of any court or a decision or award of an Impartial Chairman or Arbitrator they are legal because Section 302(c)(2) of the Taft-Hartley Act so provides.

Third: Budget's obligation under the collective agreement required it to deal only with contractors in contractual relations with the Union, *i.e.*, union shops. *Budget's argument of illegality is based on the unique—indeed, the almost incredible—claim that, because it deliberately violated its contractual obligation not to deal with non-union contractors, it thereby acquired immunity from paying to the Funds on the ground that its breach of the agreement rendered payments to the Funds illegal.* This argument has heretofore been properly rejected by the courts (*Greenstein* v. *National Skirt & Sportswear Association, Inc.*, 178 F. Supp. 681 [S. D. N. Y.]; *Kreinder* v. *Clarise Sportswear Co.*, 184 F. Supp. 182 [S. D. N. Y.]; see also *Lewis* v. *Mill Ridge Coals, Inc.*, 188 F. Supp. 4 [E. D. Ky.], aff'd. 298 F. 2d 552 [C. A. 6]).

Matter of Larry Jay, Inc. [Joint Board of Dress and Waistmakers' Union of Greater New York], 3 App. Div. 2d 386 [N. Y.], aff'd 4 N. Y. 2d 912), mentioned on pages 15 and 16 of Budget's petition, has nothing to do with the situation here involved nor does it stand for the proposition for which it is cited. That case does not protect "the wages of non-union contractor(s)". It involved a jobber in con-

tractual relations with the Union who had regularly designated a union contractor who worked exclusively for him and was not permitted to work for anyone else. The jobber guaranteed the payment of wages to workers of the union contractor in the event of the latter's default in such payment. None of these factors are present in this case. The workers in the shops of Budget's non-union contractors and in the shops of Harvic's non-union sub-contractors would have no rights against Budget or Harvic, respectively, if these contractors or sub-contractors defaulted in the payment of wages or in the performance of any other obligation.

Fourth: The Funds herein are pooled funds, and the rights of workers accrue only as they meet the eligibility requirements of the Rules and Regulations. There is nothing illegal about pooled funds (*Minkoff* v. *Scranton Frocks*, 181 F. Supp. 542 [S. D. N. Y.], aff'd on opinion of the Court below, 279 F. 2d 115 [C. A. 2]). Section 302(g) expressly takes cognizance of pooled funds by exempting from the restrictions of Section 302(c)(5)(A) funds in existence prior to January 1, 1947, which provide for "pooled vacation benefits".

Fifth: Budget confuses payments required to be made to the Funds with payment of benefits by the Funds to eligible workers entitled thereto. *Neither has anything to do with the other.* The requirement that payments to the Funds be made on the basis of a specified percentage of wages paid by jobbers and manufacturers to workers in their inside shops and a lesser specified percentage of total payments made by jobbers and manufacturers to their contractors merely fixes the *extent* and the *amount* of an employer's obligation. It constitutes a measuring rod for the computation of that obligation.

As the Court noted in *Klein* v. *Cross* (319 P. 2d 471 [Cal.]):

> "The employer's obligation to pay is measured by the hours worked, not by the benefits an employee may receive."

The parties to a collective agreement are free to select any measuring rod upon which they agree. Congress imposed no limitation thereon (cf. *Greenstein* v. *National Skirt and Sportswear Association*, 178 F. Supp. 681 [S. D. N. Y.]). Had the parties in this case so desired, they could have based the payments to be made to the Funds by Budget on the number of dresses manufactured, or the number of needles or spools of thread used, or even the number of decisions to be written by this Court in any given period of time. Congress left them free to use any basis upon which they agreed to fix the extent of the obligation of the employer to pay to the funds.

Sixth: The right to receive benefits from the Funds is *not* contingent upon union membership (pp. 33b-38b). Indeed, it cannot be made so under the Taft-Hartley Act (*Jandel Furs*, 100 NLRB 1390; *Local 138, International Union of Operating & Engineers*, 123 NLRB 1393; *Motion Picture Operators Union of Essex County, Local 244*, 126 NLRB 376; *Indiana Gas and Chemical Corp.*, 130 NLRB 1488; *NLRB* v. *Local 815, IBT*, 290 F. 2d 99 [C. A. 2]; *Lewis* v. *Hixson*, 174 F. Supp. 241 [W. D. Ark.]; *Minkoff* v. *Scranton Frocks*, 181 F. Supp. 542 [S. D. N. Y.]; aff'd on the opinion of the Court below, 279 F. 2d 115 [C. A. 2]). The right of a worker in the dress industry to receive benefits from these Funds depends on his employment in one of the crafts covered by the collective agreement, by a "covered employer", i.e., an employer in collective agreement with the Union, and upon his meeting other eligibility requirements not here germane. A worker who meets these eligibility requirements is entitled to receive benefits

equally with all other workers who meet those eligibility requirements, *whether or not he is a union member.* If an award of benefits is improperly denied to an applicant who is entitled thereto, the applicant has an absolute and complete remedy. He may bring suit to recover the benefits to which he is entitled (*Hobbs* v. *Lewis*, 159 F. Supp. 282 [D. C. D. C.]; *Ruth* v. *Lewis*, 166 F. Supp. 346 [D. C. D. C.]; *Harper* v. *Lewis*, 186 F. Supp. 285 [D. C. D. C.]; *Szuck* v. *Lewis*, 193 F. Supp. 831 [D. C. D. C.]; *Forrish* v. *Kennedy*, 377 Pa. 370) and in appropriate case, he may file an unfair labor practice charge under Section 8 of the Taft-Hartley Act[25] (*NLRB* v. *Local 815, IBT*, 290 F. 2d 99 [C. A. 2]; *Indiana Gas and Chemical Corp.*, 130 NLRB 1488). However,

> "The validity of the agreement is not affected by any conduct or practice of the parties which would constitute an unfair labor practice * * *. At most, such conduct or practice, not authorized by the agreement itself, would show that the Union and [the employer] violated applicable law. It would not alter or change the terms of the agreement."
>
> *Lewis* v. *Quality Coal Corporation*, 270 F. 2d 140, 143 [C. A. 7], cert. den. 361 U. S. 929.

And it is the agreement which fixes the obligation to pay (*Klein* v. *Cross*, 319 P. 2d 471 [Cal.]) By consequence, the payments to the Funds here involved are not barred by Section 302.

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[25] 29 U. S. C. § 158.

II. The motion for summary judgment was not premature. It was timely made and was properly entertained.

Budget's contention that the motion for summary judgment was prematurely granted is without merit. It is bottomed on the claim that the motion was made after the Union had taken the deposition of Budget but before Budget had an opportunity to take the deposition of respondents.[26] But the examination of respondents by Budget could have added nothing. Every shred of documentary evidence relating to this case was produced either by Budget or by the Union and was identified and marked. No other documents exist.

The motion for summary judgment was based exclusively on these documents, the admissions made by Budget in its deposition and upon the undenied statements in the affidavits in support of the motion. All the evidence conceivably relevant to this case was before the District Court when it decided the motion for summary judgment. That evidence could not have been altered one iota by the examination of respondents on relevant matters and the examination of respondents on irrelevant matters could not have changed the outcome of the motion for summary judgment. And the relevant evidence establishes, beyond peradventure of any doubt, that no question of fact exists in this case.

Budget's argument on the question of prematurity poses sharply the question "What are the relevant matters which it expected to establish by the depositions of respondents"? Budget itself has furnished the answer. In the affidavits submitted by it in opposition to the motion for summary judgment (R. 13a-14a; see also 12a-13a; 29a-30a) and in its petition to this Court (p. 24), it asserts only that it would

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[26] Respondents, having served their notices to take Budget's deposition first, were entitled to priority in examination and the Court below so held on Budget's motion for priority.

establish specific instances of the denial of benefits to the employees of Budget's non-union contractors. But, Joint Board stipulated (R. 131b-132b) for the purpose of the motion for summary judgment only, that the Court could assume that Budget's non-union contractors were not "covered employers" and that their employees were not "covered workers", and, hence, none of these employees was entitled to benefits from the Funds. With this stipulation there was established all that Budget, by its own claim, hoped to establish by examining respondents. Accordingly, the existence or non-existence of specific instances of denial of benefits becomes wholly irrelevant.

Lewis v. *Mill Ridge Coals, Inc.* (298 F. 2d 552 [CA 6]), presented a situation similar to the one at bar. There the defendants sought a continuance of the motion for summary judgment under Rule 56(f) of the Federal Rules of Civil Procedure for the purpose of taking the deposition of plaintiff to support their contention that the payments required to be made to the Welfare and Retirement Fund of the United Mine Workers were illegal. Since the money due to the Fund was required to be paid as a matter of law, and the obligation to pay could not be altered by the taking of plaintiff's depositions, the Court denied the continuance and granted the motion for summary judgment.

Here, there was not involved any complicated course of legislation, contracting or practice, depending for its construction on inferences drawn by the Court (*cf. Kennedy* v. *Silas Mason Co.*, 334 U. S. 249), or questions of credibility revolving about the weight to be accorded to the testimony of expert witnesses (*cf. Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620), or a complex antitrust litigation where motive and intent play leading roles and proof is largely in the hands of the alleged conspirators (*cf. Poller* v. *Columbia Broadcasting System*, — U. S. —, 7 L. ed. 458). Here, there was not involved a "trial by affidavit" turning on the credibility of the affiants (*cf. Colby* v. *Klune*, 178 F. 2d 872 [C. A. 2]). Here the material

facts were established by incontrovertible documentary evidence and concessions and admissions made by Budget on its deposition. The sole issue remaining was one of law.

Since respondents in this case had fully established the absence of any genuine issue as to the material facts, they were entitled to judgment as a matter of law. It is plain, therefore, that the motion for summary judgment was not prematurely made. The District Court properly granted it and the Court of Appeals properly unanimously affirmed the judgment of the District Court.

III. Budget's action is barred by the doctrines of *res judicata* and collateral estoppel.

The doctrines of *res judicata* and collateral estoppel were raised in the District Court and were held inapplicable (R. 64a-65a). The Court of Appeals, approving the disposition of the Court below on the merits, did not concern itself with this question. We respectfully submit, however, that these doctrines furnish an additional basis for sustaining the granting of summary judgment.

Although the authority to confirm the awards for $17,480.97 and $13,759.49 is derived from federal law [27] (*Textile Workers' Union of America* v. *Lincoln Mills*, 353 U. S. 448), the jurisdiction of the Federal Courts is not exclusive. State courts have concurrent power to do so (*Charles Dowd Box Co. Inc.* v. *Courtney*, — U. S. —, 7 L. ed. 2d 483; *Minkoff* v. *Scranton Frocks*, 172 F. Supp. 870 [S. D. N. Y.]; *McCarroll* v. *Los Angeles County District Council*, 315 P. 2d 322 [Cal.], cert. den. 355 U. S. 932). Of course, it is federal law which is applied and enforced, whether in the state or federal forum (*Charles Dowd Box Co., Inc.* v. *Courtney*, — U. S. —, 7 L. ed. 2d 483; *Local 174, Teamsters, etc.* v. *Lucas Flour Co.*, — U. S. —, 7 L. ed. 2d 593). Since the rights asserted by Budget in oppo-

[27] Taft Hartley Act, Section 301, 29 U. S. C. A. § 185.

sition to the motion to confirm the award for $13,759.49 stem from a federal statute, Budget, after its motions for leave to appeal to the New York Court of Appeals had been denied, could have applied to the U. S. Supreme Court for a writ of certiorari to review the determination of the Appellate Division (28 U. S. C. § 1257[3]; *cf. Fox Film Corp.* v. *Muller*, 296 U. S. 207). It failed to do so and its time to make such application has long since expired (28 U. S. C. § 2101[c]).

Thus, it is plain that the legality of the payments under Section 302 could have been—and, indeed, were—tested and determined in the state forum. And, it is against this backdrop that the doctrines of *res judicata* and collateral estoppel must be considered.

Once a matter has been litigated, the duel may not, thereafter, be renewed between the same parties, whether in the same or a different forum (*E. V. Prentice Machine Co.* v. *Associated Plywood Mills*, 252 F. 2d 473, 476 [C. A. 9]; *Schuykill Fuel Corp.* v. *B. & C. Nieberg Realty Corp.*, 250 N. Y. 304).

> "The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment."
>
> *Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591, 597.

And the judgment is conclusive not alone as to matters litigated but also to matters which could have been litigated, provided that their identity is such that a different judgment in the second action would impair rights created by the first (*Schuykill Fuel Corp.* v. *B. & C. Nieberg Realty Corp.*, 250 N. Y. 304, 306-307).

We turn first to the award for $13,759.49. There, the Union and Budget were opposing parties. The cause of

action was the same, for Budget's claim, although advanced by way of defense, involved the legality of the award under Section 302. The basis there urged for illegality is the same basis here urged upon the Court. The issue litigated was identical. By consequence, the determination there rendered is final and wholly dispositive of the contention here advanced by Budget.

Insofar as concerns the awards for $44,000 and $17,480.97, the alleged illegality of the payments to the Funds under Section 302 was never specifically raised by Budget. Necessarily, therefore, the question is presented: Does the doctrine of *res judicata* bar the raising of that issue here?

As we have hitherto indicated, *res judicata* is applicable not only to matters actually litigated, but also to any matters which might have been so litigated (*Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591; *Schuykill Fuel Corp.* v. *B. & C. Nieberg Realty Corp.*, 250 N. Y. 304; *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U. S. 89). However, the applicability of the doctrine is dependent on whether "the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first" (*Schuykill Fuel Corp.* v. *B. & C. Nieberg Realty Corp.*, 250 N. Y. 304, 307; *Statter* v. *Statter*, 2 App. Div. 2d 81 [N. Y.]).

In determining the measure of identity of the two causes of action, form is unimportant. What is controlling is whether the rights created by the judgment in the first action would be destroyed or impaired by a contrary determination in the second.

The "Restatement of the Law of Judgments" (§ 61, p. 240), notes that the controlling factor in determining the identity of the two causes of action is whether "the evidence

needed to sustain the first action would have been sustained the second action."

However the situation may be viewed, it is clear that the identity between the award of the Impartial Chairman for $44,000 and the judgment confirming the award for $17,480.97, with the claims advanced by Budget in respect thereto in this action is such that a different judgment in this action would destroy the rights established both by the award and the judgment. The award (which could have been the subject of a motion to vacate, but was not) and the judgment (the opposition to which was most strenuous), established the rights of the Funds to the payments in question. A contrary determination in this action would destroy the rights thus created. Indeed, *the very purpose of this action is to destroy the rights created by the award and the judgments.*

The doctrine of *res judicata* is applicable to awards rendered by an arbitrator as well as to judgments rendered by a court (*Abrams* v. *Macy Park Construction, Inc.*, 282 App. Div. 922 [N. Y.]; *Hall* v. *Sperry Gyroscope Co.*, 130 N. Y. S. 2d 505 [N. Y.]; *N. Y. Lumber and Wood Working Co.* v. *Schneider*, 119 N. Y. 475).

Since the claims here raised by Budget could have been litigated in these prior proceedings, it is plain that the doctrine of *res judicata* is a complete and absolute defense to this action.

But, the doctrine of *res judicata* is not limited solely to "direct estoppel". Collateral estoppel by judgment is one of its facets. More limited in scope, for it bars only issues actually litigated and judicially determined (*Statter* v. *Statter*, 2 App. Div. 2d 81 [N. Y.]), it too, bars Budget's present suit. The fact is that the issue of the legality of the payments under Section 302 *was actually raised and litigated* in connection with the award of $13,759.49. It was disposed of in the decision of the New York Supreme

Court. It was the only question raised by Budget on its appeal to the Appellate Division, which unanimously affirmed the judgment. Leave to appeal to the New York Court of Appeals was denied and no application for certiorari to the United States Supreme Court was made, although such an application could have been made. These state court decisions have determined the issue. It may not now be relitigated. Budget may not now use the federal courts as an instrument for compelling the return of monies which the Impartial Chairman and the New York courts have required Budget to pay to the Funds.

Although in our discussion of *res judicata* and collateral estoppel, we have relied, in part, on New York cases, federal law coincides therewith (*Cromwell* v. *County of Sac*, 94 U. S. 351; *New York Life Insurance Company* v. *Bangs*, 103 U. S. 780; *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U. S. 89; *Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591; *Clinton Engines Corp.* v. *Briggs & Stratton Corp.*, 175 F. Supp. 390 [E. D. Mich.].

Moreover, the United States Courts have pointed out that whether a state court judgment is *res judicata* with respect to an action brought in the federal court must be determined under state law (*Angel* v. *Bullington*, 330 U. S. 183; *Frost* v. *Bankers Commercial Corp.*, 194 F. 2d 505 [C. A. 2]; *Williams* v. *Green Bay and W. R. Co.*, 68 F. Supp. 509 [S. D. N. Y.]; *Ray* v. *Hasley*, 214 F. 2d 366 [C. A. 5]).

CONCLUSION

No novel question is presented by this case. The decisions of the courts of appeal with respect to the issue here involved are not in conflict but, to the contrary, are in accord. The determinations, both of the District Court and the Court of Appeals, do not conflict in any way with applicable decisions of this Court. Moreover, there is absolutely no merit to petitioner's application. Accordingly, the petition for a writ of certiorari should be denied.

Dated: July 25, 1962.

Respectfully submitted,

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Appendix

Section 302, National Labor Relations Act, as amended (29 U. S. C. § 186)*

(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employes any money or other thing of value.

(c) The provisions of this section shall not be applicable * * * (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; * * * or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or

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* This section was amended, in respects not here germane, by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act). The amendment became effective on September 14, 1959. Since this action was commenced on August 6, 1959, and relates to payments due on or prior to January 31, 1958 we set forth the law as it existed at that time.

hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in the event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.